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THE SHARIA, ISLAMIC FAMILY LAWS AND INTERNATIONAL HUMAN RIGHTS LAW: EXAMINING THE THEORY AND PRACTICE OF POLYGAMY AND TALAQ

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ABSTRACT

This article assesses the compatibility of the Sharia and Islamic family laws with international human rights law. As a subject of enormous complexity and variation, detailed examination is restricted to two of the highly contentious subjects of Islamic family laws – polygamy and the Talaq (unilateral divorce given by the husband) within Islam. It is argued that while the Quran and Sunna remain the principal foundations of the Sharia, the formulation of a legally binding code from primarily ethical and religious sources has not been an uncontested matter. It is also submitted that the Sharia and Islamic family laws that eventually emerged during the second and third centuries of the Muslim calendar were heavily influenced by the socio-economic, political and indigenous tribal values of the prevailing times. During the development phases of the classical legal schools, the Islamic jurists frequently adopted male-centric approaches towards women's rights and family laws. As regards polygamy and the Talaq it is only recently (and with considerable reservations) that Islamic societies have allowed a debate and enquiry into the reform of established norms of the Sharia. Attempts to rectify the injustices built into the prevailing system of polygamous marriages and unilateral Talaq procedures have resulted in some, albeit limited, success through the process of directly appealing to the primary sources of the Sharia. The article concludes with the view that the Sharia and Islamic family laws are likely to remain relevant to Islamic societies as well as to English Law – a consistent review and re-interpretation of the Sharia is therefore of utmost significance.

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INTRODUCTION

Islam and Muslims are the subjects of considerable attention both internationally as well as within the UK (Rehman, 2000; Rehman, 2003/4). Amidst the wider debate of 'war-on-terror', differing approaches towards human rights, and a possible 'clash of civilizations', issues around divergent approaches to personal and family laws only rarely manage headline news (Rehman, 2005). Notwithstanding, the relative lack of a comprehensive understanding of Islamic family laws and social values, the subject matter is significant for the UK's legal and judicial systems. The continued relevance of Islamic family and personal laws is highlighted by the consistent invocation of the Sharia principles and the projection of diversity and religious pluralism within domestic courts (Poulter, 1986; Poulter, 1998). Requirements of the Sharia have been invoked in such contentious matters as the veil, headscarves and the wearing of Jilbab at work and in educational institutions,[1] education,[2] formalities and capacity to enter a marriage (on proxy marriages, see Poulter 1990),[3] validity of arranged or forced marriages,[4] recognition of polygamous marriages (Shah, 2003; Murphy, 2000),[5] consequence of the Talaq (unilateral divorce by the husband) (Mayss, 2000),[6] and Muslim religious obligations during employment.[7] Although the aforementioned issues have to be adjudicated by judicial and administrative officers in accordance with English law, it is often the case that elements of international law – through private international law, human rights law and application of Sharia law as foreign law – have to be factored in judicial decision-making.

The present article focuses on those aspects of Islamic Sharia that relate to Islamic family laws and in so doing assesses the question of compatibility of the Sharia with modern international human rights law. As a subject of enormous complexity and variation, detailed examination is restricted to two highly contentious subjects of Islamic family laws – polygamy and the Talaq within Islam. The article is divided into four sections. Section 1 examines the sources of the Sharia and Islamic family laws. While contextualizing the debate on issues surrounding polygamy and Talaq, sections 2 and 3 examine the reform movements within contemporary Islamic States.[8] The final section provides a number of concluding observations.

1. ARTICULATING THE SOURCES OF THE SHARIA AND ISLAMIC FAMILY LAWS

The concept of Islamic family laws encapsulates primarily those areas of the Sharia that deal with marriage, divorce, maintenance, custody of children and succession (see An-Naim, 2002; Pearl and Menski, 1998;

Mallat and Connors, 1990; Esposito, 1982). As a significant branch of the Sharia, the modern application of Islamic family laws necessitates an understanding of sources and composition of the Sharia principles. The articulation of the substance of the Sharia in the context of Islamic family laws also raises challenging questions about the apparent inconsistencies between the Sharia and modern human rights law. Examples of such discrepancies include the continuation of the institution of polygamy, criminal offences for sexual relations outside marriage and for homosexual activity, the concept of Talaq, maintenance post-divorce, succession laws, and the absence of the concept of adoption (Mayer, 1995; Weeramantry, 1988; Baderin, 2003; Afshari, 1994; Riga, 1991; Entelis, 1997; Ali, 2000. For an overlap between Islamic criminal law and sexual offences see Bassiouni, 1982).

Islamic family laws derive from two fundamental sources of the Sharia: the Quran and the Sunna. The Quran, according to Muslim belief, represents the accumulation of the verses revealed by God to Prophet Muhammad (Denny, 1994; Weeramantry, 1988; Lombardi, 1998). According to the Islamic faith, every word of the Holy Quran is divine and cannot be challenged. Neither Prophet Muhammad nor any other human being had any influence over the divine book, save for its structuring and the names of the *surahs* (chapters) which were established in the years that followed the Prophet's death. While meticulously noted down, and revealed in stages during the lifetime of the Prophet, the Quran was produced as an authentic text only during the currency of the third Caliph Hazrat Uthmān (Mahmassani, 1966; Coulson, 1964; Zweigert and Kötz, 1998). The Quran is aimed at establishing basic standards for Muslim societies and guiding these communities in terms of their rights and responsibilities. At the time of its revelation it provided a set of progressive principles. It advanced such values as compassion, good faith, justice and religious ethics with reformist ideals. The Quran, however, is not a legal document and its primarily ethico-religious revelations should not be equated to *lex lata*; in fact there is little in the Quran with strict legal content. From over 6000 verses of the Quran, strict legal content is arguably attached to only around 80 verses (Badr, 1978; Ali, 1997a; Glenn, 2000, Coulson, 1964)[9] and, 'even in these verses there are both gaps as well as doubts as to whether the legal injunction is obligatory or permissive, as indeed whether it is subject to public or private sanction' (Pearl and Menski, 1998: 3). Save for a few specific offences, there is no indication of criminal sanctions (An-Na'im, 1990). Even in the context of the most serious crimes for which penalties are prescribed, the evidential requirements are stringent to ensure that punishment is awarded only in the absence of any doubt as to the commission of the crime by the accused through requisite *mens rea* (Bassiouni, 1982: 3–54). Some regulations can be identified in relation to personal and family laws, though

establishing the scope, nature and application of these norms has proved complex and complicated (Esposito, 1982). Indeed the Quran provides its own description as Huda, or guidance and not as a legally binding code. Therefore, the principal attribute of the divine book is in providing 'sublime statements of the ought to be the Holy Quran contains a comprehensive and perfect world-and-life view'(Ragi al-Fruqi, 1962: 35).

If extrapolating legal norms from the Quranic verses has proved onerous, derivation of laws based on Sunna of the Prophet has been riddled with debate and controversy. The Sunna – the second principal source of Islam – represents model behaviour and is referred to as the tradition and practices of Muhammad, the Prophet of Islam. The Sunna of the Prophet has been expanded through the practices of Prophet Muhammad's followers and other Islamic leaders (Rehman, 2005). The concept of Sunna had been in vogue long before the birth of Muhammad and was actively practised by contemporary Arab communities. While maintaining its characteristics, the application of Prophet Muhammad's Sunna took on board a more profound spiritual and religious meaning. It was to be, after the word of God, the most revered source of knowledge and legal acumen. The Sunna of Prophet Muhammad, in the words of one scholar, 'is an idea as well as a memory, and it is an ideal for Muslim behaviour. As such it is engrained in the lives of pious Muslims and handed down by example and personal teaching' (Denny, 1994: 159). The memorization and transmission of the Sunna in a literary form is characterized as *hadith*. The term *hadith* with the meaning 'occurring, taking place' represents the 'report' of Prophet Muhammad's Sunna (Weeramantry, 1988). The Sunna of Muhammad therefore is preserved and communicated to the succeeding generations through the means of hadiths (Al-Mūsawi, 1997).[10] While the Quran was recorded within a relatively short time, the recording of the Sunna took a much longer period (Mahmassani, 1966). Several elements of the Sunna were derived from sources not readily identifiable or reliable. Over the proceeding centuries, there has developed a significant debate regarding the authenticity and accuracy of some of the Sunna, with legal scholars suggesting the possibility of substantial fabrication in the recording of the Sunna. Commenting on this subject, Coulson (1964: 22) makes the point that 'the extent of (Muhammad's) extra Qur'ānic law-making is the subject of the greatest single controversy in early Islamic legal theory'. The early jurists, attempting to establish firm legal principles of the Sharia, expressed disagreements over the validity or authenticity of a number of the apparent Sunna of the Prophet, and Islamic schools differed in their approaches towards the weight that can be accorded to particular traditions.

In understanding Islamic family laws it is important to comprehend the metamorphosis, growth and contextualization of the Sharia. The

labyrinth of religious, ethical and moral raw materials derived from the two principal sources, Quran and Sunna, were given shape and direction by Islamic scholars and jurists during the second and third centuries of the Muslim calendar. The codification of the Sharia within Sunni Islam was principally the work of four jurists: Abu Hanifa (d 767/150); Malak ibn Anas (d 795/179); Muhammad ibn Idris al-Shafi (d 820/204); and Ahmad Hanbal (d 855/241). In the absence of concrete answers from the Quran and Sunna, Muslim jurists would look for analogous situations in which a decision had been made and in this process relied upon a range of secondary sources including Ijma and Qiyas (Mir-Hosseni, 1999). Ijma, meaning 'consensus', was an important secondary source providing the Islamic community essential tools to reach agreements. It also provided a powerful methodology in the interpretation of the Quran and Sunna. A useful operation was derived from Qiyas which means application by analogy or deduction (Kamali, 1991).[11] The modus operandi of deducing legal norms from the secondary sources of Qiyas and Ijma was through the process of Ijtihad. A person who engaged in Ijtihad was described as Mujtahid. In elaborating on the functioning of the doctrine, Weiss (1978: 199–200) makes the observation that 'the process of extracting or deriving (*istinbät, istithmär*) legal rules from sources of the Law is termed, with reference to its character as a human activity, ijtihad'. Ijtihad conveyed a sense of exertion, a struggle, and has the same origins as that of Jihad. Inherent in this self-exertion and struggle were the fundamentals for reforming the society and its legal norms. (On the meaning of Jihad, see Ali and Rehman, 2005.)

Whilst unrivalled in their sincerity for developing pristine values of the Sharia, the founders of the four Sunni schools in reality established legal principles in accordance with their own subjective understanding of Islam (Rehman, 2002; Moinuddin, 1987). In the broader, pragmatic framework, the articulation of the Sharia principles and the classical Islamic family laws is therefore no more than the expression of values advanced by these jurists of the second and third century of the Muslim calendar. However, the difficulty faced by subsequent Islamic societies is that very often reviewing established norms has been treated as being tantamount to heresy. For considerable periods Muslim scholars remained reluctant to rely upon the doctrine of Ijtihad, since such an exercise implied questioning the time-honoured (though static) principles of the Sharia (Schacht, 1964; Coulson, 1964). Within Islamic jurisprudence Ijtihad, as a process and as a strategy, has retained a contested position. On the one hand it was vehemently argued that all doors towards Ijtihad were closed leading to Taqlid, 'imitation' and the acceptance of established authority (Mir-Hosseini, 2000; Vogel, 1993). On the other hand there are modern theorists such as Hallaq (1997; 2001) who have presented an aggressive rebuttal of the position that

Ijtihad was ever formally abandoned, claiming instead its continuation throughout Islamic history. The truth probably lies in the middle ground adopted by Schacht. In his classical work on Islamic law, Schacht notes that:

> [t]he rule of *taklïd* did not impose itself without opposition… In later generations also there were scholars who held that there would always be a mujtahid in existence or who were inclined to claim for themselves that they fulfilled the incredibly high demands which the theory had, by then, laid down as a qualification for ijtiähad. But these claims, as far as positive law was concerned, remained theoretical and none of the scholars who made them actually produced an independent interpretation of the Shar'īa. Other scholars did not so much claim ijtiähad for themselves as reject the principle of taklïd (1964: 72).

2. CONTEXTUALIZING THE PRINCIPLES OF THE SHARIA AND ISLAMIC FAMILY LAWS

The principal sources of the Sharia and Islamic family laws, the Quran and Sunna, represent progressive values – the legal regulations that are extrapolated from both these sources advocate, in particular, welfare of women and children. The Quran and Sunna introduced substantial improvements in the standing of women. In Pre-Islamic Arabia, women, like slaves, did not have legal standing and were deemed to be chattels – their sale and purchase was conducted collectively by the tribal elders on behalf of the tribe (see Barlas, 2002; Pearl and Menski (1998: 4) consider women in Pre-Islamic Arabia as 'objects of sale'). In the marriage process, the sale of the wife was conducted in consideration of dower (*mahar*) provided by the husband. After the transfer, the wife was the property of the husband and the larger tribe. Women did not have any legal rights or the capacity to bring claims to change their status. Instant Talaq was a customary practice and was frequently deployed. There were other abominable institutions and practices such as (female) infanticide and unlimited polygamy.

One of the major legal innovations introduced by the Quran and Sunna was to award a legal personality to women – under the Sharia they have an independent right to enter into marriage, which is deemed a civil contract legalizing sexual relations and procreation (Mannan, 1991). As a civil contract, the only formalities that are attached to the marriage are the offer of marriage by the husband and its acceptance by the wife in the presence of two witnesses (Nasir, 1990). There are, however, issues of equality and non-discrimination – the Sharia permits polygamous marriages, a Muslim male being entitled to have valid marriages with up to four wives simultaneously. According to classical interpretations of the Sharia, while a male Muslim is allowed to marry

'woman (women) of the book' which includes Christians, Jews and Zoroastrians, a Muslim female is restricted to entering into marriage only with Muslims. A valid marriage can be contracted from the age of puberty, classical Sharia equating puberty with the age of majority. Certain Islamic schools also granted authority to the parent or the guardian (wali) to enforce child marriages, with the so-called 'option of puberty' whereby marriage is rescindable when the child attains puberty or majority. The 'option of puberty' is based on juristic interpretations of Islamic family laws and is neither stated in the Quran nor is it derived from the Sunna.[12]

Polyandry is not permitted, so that Muslim women cannot have more than one husband at the same time. While there are some differences of approach within Islamic legal schools, polygamy is legitimized both by the Quran and the Sunna. This legitimacy of polygamy is reflected in modern Islamic States practices, whereby an overwhelming majority of States authorize polygamous marriages, albeit with a variety of restrictions and sanctions. The rules relating to Islamic family law, including polygamy, have led to numerous reservations by Islamic States to the Convention on the Elimination of All forms of Discrimination against Women 1979 (Rehman, 2003; Rehman, 1997).

The permissibility of polygamy within Islamic family law raises two fundamental questions: firstly, were there any rational reasons for legitimizing polygamous marriages within the Sharia and, secondly, can polygamy be justified in the light of the prohibition in international law? An instant response is to suggest that the Sharia has been insensitive towards women's rights and that continuation of such practices as polygamy is discriminatory and contrary to modern human rights law. Without challenging the prejudicial and biased nature of contemporary polygamous unions, it is submitted that the hastiness in the condemnation of historic Islamic principles fails to take account of the contextual, and flexible nature of the Sharia and the rules of Islamic family law. In assessing the rationality of the Sharia principles it is important to have regard to the seventh century Arabian tribal customs as well as the then persisting socio-economic circumstances. The Quran and the Sunna provided a reformist and enlightened code of family values to a society engaged in substantial violation of women's and children's rights. Insofar as the institution of polygamy is concerned it is persuasive to say that, save for exceptional circumstances, the classical sources of the Sharia have perceived monogamous relationship as an ideal form of association. The following Quranic verses are often taken as legitimizing polygamy. The Quran notes:

> Hand over their property to the orphans and do not exchange the bad for the good, and do not devour their property mixing it with your own. Surely, that is a great sin. Should you apprehend that you will not be able to deal fairly with

orphans, then marry of other women as may be agreeable to you, two or three, or four; but if you feel you will not deal justly between them, then marry only one . . . that is the best way for you to obviate injustice (The Quran, IV: 3–5).

To invoke the above verses as an unrestricted licence for continuing the institution of polygamous marriages is contrary to the spirit of the Quran. An examination of the Quranic verses reveals the highly restrictive nature of polygamy with the Sharia. The permissibility to engage in a polygamous marriage, as Barlas (2002) has argued, 'serves a very specific purpose: that of securing *justice for female orphans*' (italics provided at 190). There are additional caveats and conditions, which form an essential precondition to entering a polygamous marriage. The *Quranic* ideal clearly is to establish monogamous union, which is also affirmed in Sura Al-Nisa, whereby the Quran notes, 'You cannot keep perfect balance emotionally between your wives, however much you desire it' (IV: 130).

Furthermore, the context in which the aforementioned Quranic verses were revealed also demonstrates their pragmatic nature. The divine ordinance was communicated to the Prophet in the aftermath of the bloody battle of Uhud (625 A.D.) which had resulted in the loss of many male warriors leaving scores of young women widowed and children orphaned. As the Sharia and Islamic family laws developed in the second and third centuries, legal scholars removed themselves from the pragmatic and reformist spirit of the Quran and the Sunna. The male dominated societies of the Arab and Muslim world entered into an abuse of the system with considerable exploitation of the rights of women and children with biased construction of 'Islamic jurisprudence where gender neutral terms have been translated and interpreted as masculine, thus creating gender hierarchies and unequal rights for men and women' (Ali, 1997b: 199).

Given the changes in the social, political and legal environment, the continuation of the practice of polygamy demands a substantial explanation. Many of the historic reasons within the Islamic world for justifying polygamous marriages (for example, the surplus of women and loss of men through battles and armed conflict) are no longer tenable. Yet, it is undoubtedly the case that there remains a huge socio-economic imbalance between the position of men and women within Islamic societies. There is also an absence of a social-security network within contemporary Islamic States to prevent the exploitation of economically dependent vulnerable divorced women. Modern constitutional and State laws must advance sufficiently to close the socio-economic gap. Until complete equality between men and women is reached, polygamy as an institution could arguably serve to protect those women who would otherwise be condemned, discarded or abandoned in that society through the operation of divorce or nullity laws.

In anticipation of a developmental stage ensuring socio-economic gender equality and a complete abolition of polygamy, various legislative and administrative strategies have been adopted by Islamic societies. Firstly, reliance has been placed upon the legal doctrine of *takhayyar* (eclectic choice) (Hallaq, 1997; Coulson, 1969). As a modern phenomenon, *takhayyar* denotes selection of the most appealing and appropriate doctrine from amongst the existing Islamic schools. Such an approach provides a more equitable solution in circumstances where insistence on the application of the principles derived from any one school would lead to injustice (Hallaq, 2004). In the context of Islamic family laws, the application of *takhayyar* has allowed the incorporation of specific clauses within the contract of marriage, prohibiting the husband to enter into polygamous marriages or other actions detrimental to the interests of the wife. Within the classical understanding of the Sunni Islamic schools of thought, such clauses were only permissible within the Hanabali school but not in the Hanafi school. However, the usage of *takhayyar* doctrine authorized Islamic jurists from all schools of thought to specifically incorporate provisions in marriage contracts prohibiting polygamous marriages. Secondly, Islamic communities have, at long last, expressed greater readiness to adopt a contextual and methodological interpretation of the Quranic provisions. This has resulted in significant limitations placed on polygamous marriages, for example in Pakistan,[13] Syria, [14] Iraq[15] or through its outright abolition, as in the case of Tunisia. [16]

Pakistan, with its unique religious-political history, presents a complicated case for the application of the Sharia and Islamic family laws (Mehdi, 1994; Ali and Rehman, 2003). In the pre-partition Indian subcontinent, Hindus and Muslims continued to determine matters of family law through the dictates of established personal laws. The British colonial rulers specifically required Muslim and Hindu religious experts to assist local courts over personal and family law matters. There thus emerged a mixed brand of law, known as ‘Anglo-Mohammadan’ law. A number of limited legislative reforms were nevertheless injected into customary practices and the operation of family laws. Notable amongst these were the Code of Civil Procedure 1859, the Indian Penal Code 1860, the Code of Criminal Procedure 1861, the Evidence Act 1872 and most significantly the Dissolution of Muslim Marriages Act 1939 which, as considered below, impacted upon the application of classical Hanafi grounds of granting divorce (Pearl and Menski, 1998). In its post-independence period, the most significant piece of legislative enactment, the Muslim Family Laws Ordinance 1961 has created various restrictions on polygamous marriages.

A system of compulsory registration was introduced for all marriages solemnized under Muslim law.[17] Prior to entering into a polygamous marriage, Muslim men are required to obtain the written permission of

the Arbitration Council, a Council which consists of a representative of existing wife (or wives), his own representative and a neutral chairperson.[18] In addition to stating the reasons for a proposed polygamous marriage, the petitioner is also required to inform the Council as to whether the consent or agreement of the existing wife or wives has been obtained.[19] A second or further marriage is only permissible once the Arbitration Council is satisfied as to its 'necessity and just' nature in accordance with the Rules laid down in pursuance of the Muslim Family Laws Ordinance 1961. Rule 14, in defining 'just and necessary', points towards the following grounds: physical unfitness, insanity, infertility, sterility of the wife (wives) and wilful avoidance of a decree for restitution of conjugal rights on the part of the existing wife (wives).[20]

Notwithstanding this substantial move towards restricting polygamous marriages, the legislative sanctions placed are minuscule and have served as an ineffective deterrent. In practice, there are significant breaches of many of the key provisions of the ordinance, relating to registration of the marriage or obtaining the requisite permission. A marriage that is contracted without the permission of the Arbitration Council nevertheless remains valid. The limited penalties that are attached to the failure to comply with s 6 provisions – immediate payment of the dower to existing wife (wives) and imprisonment up to one year – are rarely, if ever, enforced (Farani, 1992). Furthermore, the Islamization process during the years of General Zia-ul-Haq (1977–88) reinvigorated the debate over Pakistan's credentials as an Islamic State, and the demand by the Muslim clergy for the repeal of the Muslim Family Laws Ordinance 1961. General Zia introduced several laws, such as the notorious Hudood Ordinances (1979) and the Qanoon-e-Shahadit Act (1984) which had a substantially damaging effect on the rights of women and religious communities (Jahangir and Jilani, 1990; Rehman, 2001). In contrast to Pakistan, the Tunisian legislative prohibition of polygamous marriages represents a positive and forceful assertion of the proper understanding and re-interpretation of the Sharia. The rationale behind the law is that the present social, economic and political conditions place an irrebutable presumption of monogamous Muslim marriages: the condition of justice and equity amongst wives s perceived not only in an economic and financial sense, but also from the perspective of love, affection and emotional attachment which cannot be disturbed equally in a polygamous relationship (Doi, 1984; Hinchcliffe, 1970).[21] This Tunisian legislative prohibition on polygamy epitomizes the sentiment which was adopted by an active and interventionist judiciary in Bangladesh (formerly East Pakistan) where in the case of *Jesmin Sultana* v *Mohammad Elias*[22] the High Court demanded the repeal of s 6 of the Muslim Family Laws Ordinance 1961 and the imposition of provisions banning polygamy (Pearl and Menski, 1998).

3. ISLAMIC FAMILY LAW AND THE CONTROVERSY OVER TALAQ

Both the Quran and the Sunna – the primary sources of the Sharia and Islamic family law – present negative attitudes towards Talaq (see The Quran, LXVI: 1). A number of Quranic verses discourage Talaq and deter those engaged in such practices (The Quran, LXVI: 1). In many of the Quranic verses equality is advocated between husbands and wives during their marital relationship. The Sharia principles as they developed within the Islamic schools of thought (during the second and third century) nevertheless did not translate the Quranic reservations on divorce law into legal ordinances. On the contrary, the legal schools influenced by the prevailing social, economic and political conditions granted significant advantages to husbands over wives in the process. All Islamic schools permit Talaq, with the right to divorce being regarded as 'unencumbered' within the Hanafi School (Esposito, 1982: 31). In this interpretation, a Muslim man who has attained the age of puberty has an absolute right to divorce his wife without having or citing any reasons for such an action. The Talaq can be pronounced even in the absence of, and without the involvement of, the wife in the process (Esposito, 1982).

Within the Sharia, women are granted a right to divorce, although they have (depending on the school of thought) the significantly onerous task of obtaining it, invariably by means of a judicial decree. A Khul (also known as Khula) divorce can be obtained by the wife although it requires the consent of the husband and the wife is required to forego part of (or the entirety of) the dower.[23] Reliance on Khul is less arduous as the evidentiary requirements are less exacting and the wife is not required to establish specific grounds for divorce, other than having developed irreconcilable differences with her husband (Balchin and Warrich, 1997). Dissolution of marriage is also permissible through a judicial rescission of the marriage contract. The process of rescission of the marriage by the Qadi at the behest of the wife is known as faskh (annulment or abrogation). Islamic schools have varied significantly over the grounds upon which a wife could claim annulment of the marriage. The Hanafi school, the narrowest of all four Sunni schools, allows such a dissolution of the marriage only where the marriage cannot be consummated as a consequence of a husband's impotence or a husband's desertion for a period of 90 years or where the wife can exercise the 'option of puberty'. Under the classical Hanafi jurisprudence, a wife is unable to divorce even in cases of maltreatment, cruelty or the husband's inability to support her (Carroll, 1996; Esposito, 1982). As will be shown in subsequent discussion, Hanafi law as practised within the Ottoman and Mughal empires was criticized for its highly restrictive approach and was subsequently subjected to scrutiny and reform.

The extremely restrictive and narrow grounds as contained in the Hanafi school are not followed by all schools. The Malaki school – which is the most liberal school – provides women with the right to bring judicial proceedings in instances of cruelty, refusal or inability to provide maintenance, desertion by the husband or disease or ailment of the husband. Although the initial Malaki interpretation of such concepts as cruelty, refusal or inability to maintain and desertion were rigid and biased against women, there has over time been a considerable re-evaluation to generate greater flexibility to meet the social, physical and economic needs of women. Even within schools outside the Sunni *fiqh* there has been re-interpretation and reform. Thus, for example, Iran – a State which operates predominantly under the Shia Jafari school – introduced legal amendments in 1982 whereby the wife is entitled *inter alia* to petition for divorce following the husband's failure to support her for a period up to six months (Mir-Hosseini, 2000; Mir-Hosseini, 1999).[24]

Attempts to redress the balance in favour of women have a long and enduring history. Within Sunni Islam, Egypt and Pakistan provide useful examples. The initial attempts to reform the Hanafi law in Egypt were conducted under the Ottoman tutelage through the Ottoman Law of Rights 1917. However, it was only the Egyptian law (No 25/1920 and law No 25/1929) which brought about significant reforms in the country's personal and family laws. These laws *inter alia* established additional factors (such as the husband's incurable defect or contagious disease, his desertion, failure to provide maintenance and maltreatment) as grounds for divorce petitions (Esposito, 1982). The classical Hanafi rule of 90 years of disappearance of husband was deemed extremely harsh and was replaced by a continuous absence of one year. A further more significant ground established by law 25 of 1929 opened up the possibility of divorce once the court was satisfied as to the irreconcilable differences as a consequence of the husband's maltreatment or harm (*darar*). Additional laws were introduced in 1979, which provided for compulsory registration of Talaq and the requirement that the wife be given notice of the Talaq.[25] The Talaq remained ineffective until the time of its notification to the wife. The husband was obliged to notify the wife of any of his polygamous marriages which would also entitle her to petition for divorce. Failure to obtain permission amounted to an additional basis for the wife to petition for divorce (Arabi, 2001).

The 1979 enactments introduced by President Anwar Saddat were struck down by Egypt's Supreme Court in May 1985 on the basis of their being *ultra vires* the constitution (An-Naim, 2002). Revised legislation, the Law of Personal Status 1985, whilst incorporating the key provisions from the 1920 and 1929 laws on Personal Status, nevertheless withdrew the wife's automatic entitlement to petition for divorce as a

consequence of the husband's polygamous marriage. Under the 1985 legislation, the wife had to establish that she had suffered 'harm' as a result of the polygamous marriage. This law was eventually reformed by President Hasani Mubarak in 2000.[26] The 2000 legislation allows a wife to petition for divorce on the grounds of 'incompatibility' within marriage without her having to establish evidence of 'harm' (Human Rights Watch, 2004). The petitioner in this instance must nevertheless agree to forfeit any right of dowry and to return any gifts received by her at the commencement of the marriage. A significant innovation is the provision that the husband's consent to divorcing his wife is not a requirement.[27] It is instructive that the 2000 legislative reforms in Egypt were based not upon any radical modernist agenda, but can be traced through the 'rising neo-shāfism (that) started a process of reconstruction and reinterpretation of Islamic law of historic proportions affecting the whole juridical edifice' (Arabi, 2001: 7). Relying upon the Constitutional Court's decision of 1993, which placed an exclusive reliance upon the formal sources of the Sharia – with definitive origins and meaning (*qat'iyyat al thubūt wa'l dālala*) – Egypt's lawmakers were able to bypass the established Islamic schools of thought, all of which emphasize the requirement of consent on the part of the husband. The Egyptian legislature, in adopting the 2000 law, appealed directly to the sacred text of the Quran and Sunna. The re-interpretation of the so-called 'Habiba' incident in four out of the six authoritative compendia of prophetic lore, and the tenth century canonical *hadith* collections were deployed by jurists to dispense with the requirements of Khul as a consensual divorce settlement. In analysing this rationale for the 2000 Egyptian Law, Arabi makes the insightful comment that:

> (t)he Egyptian lawmakers, legislating under the novel constitutional demand that no law promulgated after 22 May 1980 may be allowed to stand if it were to contravene the explicit content of any well-established (in its origin and meaning; *qat'iyyat al thubūt wa'l dālala*) sacred text, actually put this demand to profit by their reverting to the *sunna* collections. The wording in all these collections, we have seen, is very clear to the Prophet commanding Thābit to take back his garden and divorce Habība, without any indication that he sought the former's consent; and the reliability of the *hadīth* compendia in which they occur is the greatest in the Muslim normative universe. That the four schools of Islamic law interpreted the Prophet's words differently, namely in the light of the Qurān's notion of negotiated ransoming, belongs to the domain of hypothetical legal thought (*ijtihād*) which, in the opinion of the High Constitutional Court, could only issue in problematic rulings (*ahkām zaniyya*): the state legislators, however, are not bound by the results of any such legal reasoning, and may proceed to ignore any particular problematic opinion, especially when there is a textual rule of assured origin and meaning that decrees otherwise. These juridical policy rules of the 1990s provided the

new principles which determined the process of lawmaking that issued in the promulgation of the Law of 2000 on *khul* (Arabi, 2001: 19).

Within the Indian Sub-continent, the first concrete initiatives affecting the application of Muslim Personal Laws were brought about by the Dissolution of Muslim Marriages Act 1939.[28] The Act continues to be operational in the three countries of the Indian Sub-continent – India, Pakistan and Bangladesh – with a number of modifications and alterations (Pearl and Menski, 1998). Injustices caused by the application of the classical Hanafi law were removed by expanding the grounds of divorce for women. The husband's desertion, failure to provide maintenance, cruelty, maltreatment, chronic illness and impotence were grounds appended to the existing provisions for seeking divorce.[29] However, unlike Egypt, desertion could only be claimed after the husband's continuous absence of four years. Reform in divorce laws was initiated through judicial activism as well as through legislative enactments. Whilst the Dissolution of Muslim Marriages Act 1939 (and more recently certain provisions of the Muslim Family Laws Ordinance 1961) has been invoked by aggrieved wives before Pakistani courts for rescission of marriages, the Muslim Family Laws Ordinance 1961 has been principally deployed to establish restrictions on the husband's hitherto unrestrained rights of extra-judicial Talaq. Within Pakistan, as in the case of reducing polygamous marriage, the Muslim Family Laws Ordinance 1961 provides for various procedural constraints during the Talaq process. Under the Ordinance, the husband is obliged to provide a written notice of the pronouncement of Talaq to the Union Council along with a copy to the wife.[30] Failure to serve notice unfortunately means that the marriage remains valid and effective. Such a situation creates substantial difficulties in cases of remarriage on the part of the wife, opening up the possibility of criminal prosecution under the current draconian law of Zina (illicit fornication).[31] The chairperson of the Union Council is required to ensure notification of divorce to the wife. Within 30 days of the notification having been sent, the chairperson of the Union Council may establish an Arbitration Council in order to bring about reconciliation. In the event of a failure of reconciliation, the Talaq becomes permanent after 90 days of its notice having been communicated to the chairperson of the Union Council.

As in the case of Egypt, in order to ameliorate the situation for women, Pakistan's judicial bodies have also made a direct appeal to the primary sources of the Sharia. Pakistan's High Court has invoked a number of charitable Quranic injunctions on women's position in society (Carroll, 1996). This allowed women the right to seek Khul divorce in situations of irretrievable breakdown of the marriage. In one case, relying upon the Quranic verse 2:29 and in accepting the wife's petition for divorce, the full Bench of the High Court noted, 'the limits of God will not be observed,

that is, in their special relations to one another, the spouses will not obey God, that a harmonious married state as envisaged by Islam, will not be possible'.[32] The full Bench of the High Court:

> were aware of the revolutionary nature of their decision, of the fact that they were granting the wife a right that had been denied her by Hanafi jurists and commentators for centuries. Although they were able to invoke some support from Maliki authorities, fundamentally the Court based its position on the assertion that in dealing with the interpretation of the Qur'an they were not bound by the opinions of classical jurists (Carroll, 1996: 107).

In a further reformist Judgement, the Supreme Court of Pakistan in reliance upon Quranic verses held that Khul is a right conferred by the Quran on the wife and is available to her regardless of the husband withholding his consent. The Court in granting the divorce noted:

> In Islam, marriage is a contract and not a sacrament, and whatever sanctity attaches to it, it remains basically a contractual relationship between the parties. Islam, recognizing the weaknesses in human nature, has permitted the dissolution of marriage, and does not make it an unseverable tie, condemning the spouses to a life of helpless despair. The Quran'ic legislation makes it clear that it has raised the status of women. The Holy Qur'an declares in verse 2: 228 that women have rights against men similar to those that men have against them. It conferred the right of *khula* on women as against the right of *talaq* in men.[33]

The strategies and methodology of reforming the classical Sharia in its approaches towards Khul in Egypt and Pakistan provide a 'dramatic assertion of the right of *ijtiahad*' (Carroll, 1996: 108). In both these cases, whilst ensuring greater compatibility of Muslim divorce laws with international human rights law, the lawmakers were able to appeal directly to the primary sources of the Sharia. The invocation of the Quran and Sunna thus provided a significant opportunity for reform. That said it has to be conceded that whilst this innovative legislative and judicial intervention has to an extent ameliorated the position of women, in male-dominated Muslim societies, there nevertheless remains considerable violation of women's rights in the context of family laws. In the case of Pakistan, there are frequent instances of non-compliance with the statutory requirements of written notice to be served to the Union Council and to the wife, thereby leading to the significant risk of the wife being charged with *zina*, should she decide to remarry.[34]

4. CONCLUSION

In common with other great civilizations, the Islamic world has also experienced momentous changes. At its zenith, Islam was the focus of

attention and the cradle of human civilization. In the words of one historian, Islam 'was the best social and political order the times could offer…It was the broadest, freshest and cleanest political idea that had yet come into actual activity in the world' (Wells, 1925: 613).

This article has highlighted a number of features of the Sharia as the source of Islamic family law and in so doing highlighted several controversial issues within the system. Firstly, it has been argued that, while the Quran and Sunna remain the principal foundations of the Sharia, the formulation of a legally binding code from primarily ethical and religious sources has not been an uncontested matter. Secondly, it has been submitted that the Sharia and Islamic family laws that eventually emerged during the second and third centuries of the Muslim calendar were heavily influenced by the socio-economic, political and indigenous tribal values of the prevailing times. In the development of the classical legal schools, the Islamic jurists frequently adopted male-centric approaches towards women's rights and family laws. A cardinal mistake in the subsequent history of Islam was an insistence upon Taqlid or imitation. Although not without its controversies, for centuries the dominant voices within Muslim societies continued to argue that the doors to Ijtihad had been closed. Such an argument undermined the essence of Islam, which is based on change, reform and re-interpretation. The Arabic translation of Sharia is 'the road to the watering place', signifying progression, development and freshness (Landau, 1958; Oba, 2002; Doi, 1984; Adamec, 2001). The Quran as well as the Sunna provide excellent examples of dealing with situations in a humanitarian and pragmatic manner, with reform and creativity as vital elements of the process. The generations subsequent to the Prophet appear not to have carried this message forward.

Thirdly, this article has argued that it is only recently (and with considerable reservations) that Islamic societies have allowed a debate and enquiry into the reform of established norms of the Sharia, in particular Islamic family laws. Attempts to rectify the injustices built into the prevailing system of polygamous marriages and unilateral Talaq procedures have resulted in some, albeit limited, success through the process of directly appealing to the primary sources of the Sharia. While states such as Egypt and Pakistan have introduced limited legislative and administrative constraints on polygamous marriages and extra-judicial Talaqs, in this re-interpretation of the Sharia, Tunisia has successfully been able to abolish polygamous marriages and extra-judicial and unilateral divorces.

Fourthly, it is contended that the Sharia and Islamic family laws are likely to remain relevant to English Law. The steady growth of adherents of Islamic faith in the UK – a consequence *inter alia* of proportionally higher birth rates, secondary migration through family and marriage resettlements and conversions to Islam – also necessitates a great awareness and sensitivity towards the religious, cultural and

ethical values of these communities. Finally, it is submitted that a deeper, more profound meaning of religious as well as social values can be established through a proper understanding of the Quran and Sunna; these principal sources of the Sharia emphasize pragmatism and reform in accordance with demands of the society. The law-makers and judiciary in the UK may find the pragmatic message of the Sharia useful since there is a need for re-evaluation of established English family laws including a re-interpretation of such traditional concepts as family, marriage and divorce.

NOTES

[1] See *R* (*on the application of Begum (by her litigation friend, Rahman)*) *(Respondent) v Head teacher and Governors of Denbigh High School* (Appellants) [2006] UKHL 15 (wearing of Jilbal, a covering more extensive than hijab). On the veil, see the recent case of Ms Aishah Azmi (October 2006).

[2] See *Bradford Corporation* v *Patel* (1974) unreported. (Conviction of a Muslim father under the provisions of the 1944 Education Act for failing to send his daughter to a co-educational school on religious grounds.)

[3] On under-age marriages see *Alhaji Mahammad* v *Knot* [1969] 1 QB 1; [1986] WLR 1446, [1968] 2 All ER 563. See the Immigration Rules, para 277 Immigration and Nationality Directorate http://www.ind.homeoffice.gov.uk/lawandpolicy/immigrationrules/part8 (last visited 1 December 2006).

[4] See *Hirani* v *Hirani* (1983) 4 FLR 232 (although the particular case concerned a Hindu girl). Also note the 'primary purpose' rule, Halsbury's Law of England (1992) paras 95–7. Are arranged marriages *per se* indicative that the primary purpose of marriage is immigration to the UK? *R* v *Immigration Appeal Tribunal, ex parte Iqbal* [1993] Imm A.R. 270.

[5] See *Quorasishi* v *Quorasishi* [1983] FLR 706; See the Immigration Rules, paras 278–80 (Immigration and Nationality Directorate) http://www.ind.homeoffice.gov.uk/lawandpolicy/immigrationrules/part8 (last visited 2 December 2006). *Bibi* v *Chief Adjudicatiion Officer* (Gazattee 94/27, 9 July, 22) (case concerning entitlement to widow's pension in polygamous marriages).

[6] *Quazi* v *Quazi* [1980] AC 744; *Chaudhary* v *Chaudhary* [1985] FLR 476; Family Law Act 1986 (Part II); on Immigration See *R* v *Secretary of State for Home Department ex parte Ghulam Fatima* [1986] 2 WLR 693 (refusal of entry into UK for fiancé for non-recognition of first divorce through transnational Talaq). See UK Visas Enquires http://www.ukvisas.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1038489156801 (last visited 23 November 2006).

[7] See *Ahmad* v *Inner London Education Authority* [1978] QB 36, [1977] 3 WLR 396, [1978] 1 All ER 574 (Court of Appeal); *Ahmad* v *UK* (1982) 4 EHRR 126.

[8] The issue of identification of 'Islamic state' and its adopted interpretation of Islamic laws as 'the Islamic laws' has been problematic and highly controversial. It has been the subject of analysis elsewhere (Rehman, 2005: 26–43). Indicators may point to the proportion of Muslims in a state or the system of government that is operative. Some advocates of Islamic identity would rely upon whether Sharia is actively enforced in a state, others may acknowledge Islamic identity simply through hortatory statements in constitutional and legislative provisions. At present 15 constitutions name Islam as the 'official' religion; five states have declared themselves as Islamic Republics. For the purposes of this paper, those states are considered Islamic that are members of the Organization of Islamic Conference (OIC). The OIC identifies itself with Islam; its primary objectives are to promote Islamic solidarity and it aspires to work for the furtherance of the interests of Muslims across the globe. While the membership of the OIC is not exclusively Muslim, a huge proportion of member states do in fact have Muslim majorities. On the other hand membership does not entail any obligations to implement the Sharia or have in place Islamic political, social or ethical frameworks. For the UK, the position is also of interest: the UK has 1.6 million Muslims (2.7 per cent of the total population). The 2001 census, for the first time, inducted a voluntary question based on religious denominations – UK 2001 National Census, Religion in Britain, http://www.statistics.gov.uk/cci/nugget.asp?id=293 (last visited 13 June, 2006). All indicators are that with further immigration, increased conversion to Islam and higher levels of Muslim population growth, Muslim population will

steadily grow in the UK. Is there, then, a case for a distinct system of personal and family law for Muslims in the UK? (See Poulter, 1990: 147–66).

[9] According to Ali the legal content can be considered to be only around 80 verses. (Ali, 1997a: 266). Glenn makes the observation that 'the Koran has some law, but not much, and it's hard to find' (Glenn, 2000: 159); 'the so-called legal matter … consists mainly of broad general propositions as to what the aims and aspirations of Muslim society should be. It is essentially the bare formulation of the Islamic religious ethic … In short, the primary purpose of the Qur'an is to regulate not the relationship of man with his fellows but his relationship with his creator' (Coulson, 1964: 11–12).

[10] A Hadith consists of two parts. Isnad and Matin. Isnad refers to the link, the source or the chain of narrators of the Hadith. Hence a Hadith in its Isnad would report the person who acted as transmitters. The Matin contains the substance of the Prophets' sayings, deeds or actions.

[11] According to a well-recited Hadith, the role of Qiyas was confirmed at the time when Prophet Muhammad (whiling sending Mu 'adh b. Jalal to Yemen to take the position of a qadi) asked him the following question: 'How will you decide when a question arises?' He replied, 'According to the Book of Allah'.'And if you do not find the answer in the Book of Allah?' 'Then according to the Sunna of the Messenger of Allah.' 'And if you do not find the answer either in the Sunna or in the Book?' 'Then I shall come to a decision according to my own opinion without hesitation'. Then the Messenger of Allah slapped Mu 'adh on the chest with his hand saying: 'Praise be to Allah who has led the Messenger of Allah to an answer that pleases him'. (See 'Kiyas' in Gibb and Kramers, 1953: 267.)

[12] Complications have nevertheless arisen in modern Islamic State practices whereby Classical Sharia arguments have been advanced in relation to the role and consent of the wali eg, in the marriage of adult women. According to classical Shafi and Malaki Schools (in contrast to the Hanafi School) an adult virgin needs the consent of the wali; for a recent analysis and juridical interpretation see *Hafiz Abdul Wahid* v *Asma Jahangir* KLR (1997) (Shariat Cases) 121.

[13] Muslim Family Law Ordinance (1961).

[14] Article 17 Law of Personal Status 1953 (Decree No. 59 of 1953).

[15] Article 3, Law of Personal Status 1959.

[16] Article 18, Tunisian Code of Personal Status 1956.

[17] S 5 Muslim Family Law Ordinance 1961.

[18] S 6 Muslim Family Law Ordinance 1961.

[19] S 6 Muslim Family Law Ordinance 1961.

[20] Rule 14, Muslim Family Law Ordinance 1961.

[21] See The Tunisian Code of Personal Status 1956.

[22] (1997) 17 BLD 4.

[23] *Cf* in the exceptional Pakistani case of *Khurshid Bibi* v *Moh'd Amin* PLD 1967 SC 97, the Supreme Court held that as a matter of principle a husband's consent is not required in Khul cases.

[24] The Special Civil Courts Act 1979 (amending provisions of Family Protection Law, 1967).

[25] Law No 44 of 1979.

[26] See Law No 2000 on the Re-Organisation of Certain Terms and Procedures of litigation in Personal Status.

[27] Law No 2000 on the Re-Organisation of Certain Terms and Procedures of litigation in Personal Status.

[28] Act 8 of 1939, in force 17 March, 1939.

[29] S 2 (i)–(viii) DMMA 1939.

[30] S7 Muslim Family Law Ordinance 1961.

[31] See *The State* v *Tauqir Fatima* (1964) PLD (WP) Kar 36.

[32] *Mst. Balqis Fatima* v *Najm-ul-Ikram Qureshi,* PLD 1959 (Lahore) 566, para 42.

[33] *Khurshid Bibi* v *Muhammad Amin* (1967) PLD SC 97.

[34] *Muhammad Sarwar* v *Shahid Parveen* 1988 (SD) FSC 188.

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